



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL CASE NO. 6 OF 2018 (O.S)

NAROK COUNTY GOVERNMENT.....PLAINTIFF

VERSUS

SAMWEL KEROSI ONDIEKI T/A

KEROSI ONDIEKI & CO. ADVOCATES.....DEFENDANT

RULING

1. On the 10th October 2016 Narok County Government filed an Originating Summons against Samuel Kerosi Ondieki t/a as Kerosi Ondieki & Company Advocates. The plaintiff seeks the following reliefs that;

i. The defendant be directed to render true and correct cash account of Kshs. 25,061,535.00 paid to the defendant by the plaintiff and its predecessor between 2010 and 2015.

ii. That the defendant be directed to render to the plaintiff instruction letters, pleadings, proceedings and evidence of services rendered in the following proceedings relating claim of legal fees;

- a. Kisumu High Court Misc. Application No.96 of 2011, Samuel Kerosi Ondieki t/a Ondieki & Company Advocates vs. Narok County Government;
- b. Kisii High Court Civil Case No. 17 of 2003, Samuel Kerosi Ondieki vs. Narok County Government; and
- c. Kisii High Court Misc. Application No. 31 of 2016, Samuel Kerosi Ondieki vs. Narok County Government.

2. The Summons was supported by the affidavit of Simon M. Ole Sopia the Deputy County Secretary. The Summons was opposed. The respondent filed a replying affidavit on the 14th November 2016. The respondent also filed a Notice of Preliminary Objection to the Originating Summons and Application as follows; that the application is frivolous, vexatious and utterly misconceived, the Originating Summons does not lie, it's misconceived and bad in law and that it is an abuse of the court machinery. Simultaneously with the Originating Summons the Plaintiff filed a Notice of Motion seeking to stay proceedings/ execution of the Kisumu HCMA No. 96 of 2011, Kisii HCCC No. 17 of 2003 and Kisii HCMA No. 31 of 2016.

3. The preliminary objection was raised and argued before Justice Meoli. When this matter was placed before me I was informed by the Advocates that what was pending was a Ruling on the preliminary objection dated the 11/11/ 2016.

4. The plaintiff's case is as follows; there existed a relationship of advocate and client relationship between the defendant and the plaintiff's predecessors, the County Council of Transmara. The plaintiff paid a sum of excess of Kshs. 25,000,000/- between 2010 and 2015. That during the transition period the defendant demanded from the plaintiff some sums of monies alleged to be legal fees proceeding to execute against the plaintiff in some cases and commencing taxation proceedings against the plaintiff in others. That the plaintiff is unable to ascertain the amount due to the defendant after the above payments and cannot find records of instructions to the defendant, pleadings or any other materials evincing services rendered by the defendant against the demand thereby unable to defend itself against the proceedings by the defendant in the cases listed.

5. That in Kisumu HCMA No. 96 of 2011 the defendant seeks to have the plaintiff's officials committed to civil jail. In Kisii HCCC No.17 of 2013 the plaintiff's predecessor disowned the instructions as it was unclear what services the defendant rendered while in Kisii HCMA No. 31 of 2016 there exist no record with the plaintiff. That in the circumstances the plaintiff is unable to reconcile its financial records in terms of payments already made to the defendant. That the plaintiff is duty bound to protect public resources be ensuring that the payments made to

the defendant are accounted for and that any further claims made by the defendant are justified and legal.

6. The respondent's in opposing the Summons deposes as follows; that the applicant has all the necessary and relevant documents and or information regarding the proceedings in Kisii HCCC No. 17 of 2003, a demand letter was sent to them on the 12/8/2014 and the plaintiff complied by paying Kshs. 5,700,000/-. That there has been negotiations between the advocates of the plaintiff and the defendant, but upon approval some officers have refused to satisfy the decree. That the proceedings in Kisii HCMA No. 31 of 2016 is a Bill of Costs in a matter he handled for and on behalf of the defunct County Council of Transmara which has not been settled. That some of the payments made by the defunct County Council of Transmara related to court fees and disbursements, settlement of claims and deposit as security in court and not advocate-clients costs for the 3 matters mentioned.

7. At the hearing Mr. Chelanga reiterated what is deposed in the supporting and also submitted that they are not challenging the cases that the court has jurisdiction. That order 42 provides for taking of accounts in matters of advocates and clients. That it's not disputed that other payments were made.

8. Mr. Bosire argued that the summons is intended to deny the respondent fruits of its judgment. That in HCMA 96 of Kisumu a Bill of Costs was filed and adopted as judgment of the Court and is in the process of execution. HCCC 17 of 2003 was also a taxation and a consent was entered in JR 34/05. That these two judgments cannot be challenged by way of an originating Summons, as a separate suit cannot be used in satisfaction of a decree. What the applicant has done in the Originating summons is to file a fresh suit and therefore the same should be struck off with costs. The application in No. 31 of 2016 at Kisii is a taxation of fees, the applicant wants the taxation stopped. That the Advocate's Act is clear they can oppose the suit emanating from the taxation.

9. The Originating Summons is brought under Order 52 Rule 4 of the Civil provides as follows;

[Orders 52, rule 4.] Power to order advocate to deliver accounts and documents.

4. (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—

(a) the delivery by the advocate of a cash account;

(b) the payment or delivery up by the advocate of money or securities;

(c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;

(d) the payment into or lodging in court of any such money or securities;

(e) the delivery up of papers and documents to which the client is entitled.

(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.

(3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deems fit.

10. To enable me make a decision in this matter I have perused court files **Kisii HCCC No.17 of 2003** and **Kisii HCMA No. 31 of 2016** these are my findings; in HCCC 17 of 2003 the plaintiff was the defendant and the plaintiff in this matter the defendant. The last order was a stay of execution of the order of the Ag Deputy Registrar made on the 12/3/2015 on condition that the applicant shall effectively file an appeal and have it listed for hearing with the next six months from the date thereof (17/5/2017) in default the stay orders would vacate automatically. The suit was for a claim of taxed bill of Kshs. 28,000,000/- The plaintiff has not indicated if they filed an appeal after the order of 17/5/2017. It is evident that the parties have been in court over the defendant's claim from 2003. To come to court now to stop the said proceedings or seek documents yet the court's in last order granted a stay pending appeal is an abuse of the court process. The plaintiff had a chance to seek documents in the suit filed earlier or to challenge the issue of retainer as provided under the Advocate's Act.

11. In Misc. No. 31 of 2016 Justice Okwany in a ruling dated the 24th October 2017, again a matter between the parties in this suit which arose from the decision of the taxing master, held that the taxing master did not err in principle in assessing the instruction fees as to warrant the intervention of the court. The application was dismissed. I have not had the advantage of perusing the file from Kisumu Law Courts, Kisumu High Court Misc. Application No.96 of 2011.

12. With the above findings I am persuaded by the defendant's submission that the suit is an abuse of the court process. The plaintiff has failed to demonstrate that the two suits should be stayed or that they should be supplied with documents yet they have been litigating over the defendant's fees in other suits. The plaintiff by filing this suit has abused court process as the facts in the two files show their status and the last orders. I cannot grant a stay order in Kisumu HCMA No. 96 of 2011 as it is a matter not within the jurisdiction of this court, as it was filed in Kisumu High Court. I decline to grant the prayers sought in the Notice of Motion dated the 18th September 2016 and the Originating Summons filed in court on the 10th October 2016. Costs to the respondent.

Dated signed and delivered at Kisii this 2nd day of April 2019

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyambati h/b Chelang'a For the Plaintiff

Mr. Bosire For the Defendant

Rael Court clerk